86-371

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

_____Term, 1986

_____

JOHNNY M. IRVIN AND DAVID L. IRVIN,
Petitioners,

VS.

RABUN COUNTY, GEORGIA, ET AL,
Respondents.

_____

ON WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

_____

PETITION FOR CERTIORARI

_____

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Attorney for Petitioner

QUESTIONS PRESENTED

1. Does the Federal Court have subject matter jurisdiction of Fifth and Fourteenth Amendment claims asserted under 42 U.S.C. §1983 that a zoning ordinance is unconstitutional as applied so as to restrict mountainous property to an agricultural use for which it is not adapted and cannot be developed economically?

2. Whether local governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of a zoning regulation.

3. Does *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. _____, 105 S. Ct. 3108, 87 L.Ed.2d 126 [1985] require a landowner to pursue by an application for rezoning every conceivable permissible use under a zoning ordinance before such owner can complain of the unconstitutional restriction of a zoning ordinance as applied to the property in question?

4. When a local government's zoning ordinance is challenged as violating the Taking Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, what quantum of proof is necessary to justify the restriction imposed under the police powers?

5. Review was granted in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 84-1199, June 20, 1986. *Habersham at Northridge v. Fulton County, et al.*, No. 86-124 was docketed on July 28, 1986. As similar but more inclusive questions involving regulatory takings are presented in this and the latter case on an issue which has been before this court four times without a ruling on the merits, would it be appropriate to consider these three cases as companion cases to increase the probability of a final and complete judgment on the merits?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below are:

JOHNNY M. IRVIN AND DAVID L. IRVIN,

Petitioners,

v.

RABUN COUNTY, GEORGIA; VIRGIL P. LEDFORD, DR. RICHARD J. TURNER, MAX WATTS, Individually and as Chairman and Members of the Board of Commissioners of Rabun County, Georgia,

Respondents.

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SUPREME COURT OF THE UNITED STATES

_____ Term, 1986

NO. _____

JOHNNY M. IRVIN AND
DAVID M. IRVIN,
Petitioners,

V.

RABUN COUNTY, GEORGIA, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
Eleventh Circuit

Petition for Writ of Certiorari

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court of
the United States:

Petitioners, JOHNNY M. IRVIN and DAVID L. IRVIN, respectfully petition this Court to issue a writ of certiorari to the Eleventh Circuit Court of Appeals to review the Judgment and Opinion of that Court entered on June 12, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 12, 1986, was decided on the transcript of the record and affirmed on the basis of the Order of Court of The Honorable Charles A. Moye, Jr., United States District Court Judge, dated and filed December 3, 1985. A copy of the circuit court decision, together with Judge Moye's Order which was attached, is attached hereto as Appendix "A". The decision was not published.

JURISDICTION

The Petitioners invoked federal jurisdiction in the District Court pursuant to the provisions of 28 U.S.C. § § 1343 (3) and (4) and 28 U.S.C. § 1331 seeking the redress of the deprivation under color of state law, statute, regulation, ordinance, custom and uses of rights, privileges and immunities secured to them by the Constitution and laws of the United States seeking declaratory and injunctive relief and damages under 42 U.S.C. § 1983.

This Court has jurisdiction to review the decision of the Eleventh Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Amend. V:

> "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., Amend. XIV:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party involved in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343 gives the United States District Courts original jurisdiction of any civil action authorized by law to be commenced by any person,

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Title 28, United States Code,
Section 1254

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree;

United States Supreme Court Rule
17.1.(a), (c)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

CONCISE STATEMENT OF THE CASE

The property which is the subject of this litigation is a 26.33 acre tract of land in Rabun County located in the mountainous part of North Georgia frequented by vacationers and the owners of second homes, utilized basically during the spring, summer and fall months.

7.53 acres of the tract are zoned for vacation cottage, a little in excess of two acres lying between Rabun County Road and Lake Burton, a lake owned by Georgia Power Company, and approximately five acres on the opposite side of the road contiguous to which 18.83 acres are zoned agricultural.

The property is vacant and has been vacant so long as anyone can remember and has no present productive use. (Appendix "D")

The Plaintiffs purchased the property with the intent of developing it for multi-family condominium use with a vacation cottage motif, similar to other developments in the County, with a common water supply and a common sewage disposal facility which could not be accomplished economically except in connection with such development. This required rezoning.

The rezoning was denied and Plaintiffs filed their Complaint in District Court challenging the Zoning Ordinance as applied on Fifth and Fourteenth Amendment grounds under 42 U.S.C. §1983, seeking injunctive and declaratory relief and damages.

On cross motions for summary judgment, the District Court dismissed the case for lack of subject matter jurisdiction. The Eleventh Circuit affirmed in an unpublished opinion.

REASONS FOR GRANTING REVIEW

1. The Eleventh Circuit has Erroneously Decided an Important Question of Federal Law Which Has Not Been But Should be Settled by this Court.

This court has experienced difficulty in locating an appropriate regulatory taking case in which to rule on the merits, because the claims presented were not ripe, namely: *Agins v. Tiburon*, 447 U.S. 265, 65 L.Ed. 2d 106, 100 S.Ct. 2138 (1980); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 636, 67 L.Ed. 2.d 551, 101 S. Ct. 1287 (1981); *Williamson County Regional Planning Commission, et al, Petitioners v. Hamilton Bank of Johnson City*, supra; *MacDonald, Sommer & Frates, Appellant v. Yolo County, et al*, No. 84-2015, Dec'd June 25, 1986, 54 L.W. 4782.

There has been a "final and authoritative determination by the County" as to how it will apply the regulation in issue to the owners' property in question. The County Commission is the only body that may exercise the power of zoning. 1983 Georgia Constitution, Art. 9, Sec. 2, Par. 4.

The Georgia Supreme Court has held that constitutional challenges to a zoning ordinance as applied to a specific piece of property can only be raised in an application for rezoning of the property and must be raised before the zoning authorities before the constitutional issues may be considered in the litigation

process. *DeKalb County v. Post Properties*, 245 Ga. 214, 263 S.E.2d 905 (1980); *McCamy v. DeKalb County*, 246 Ga. 293, 271 S.E.2d 214 (1980); *Village Centers, Inc. v. DeKalb County, et al*, 248 Ga. 177 at 178, 281 S.E.2d 522 (1981).

At its June 20, 1986, session the Supreme Court granted review in the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 84-1199, in which the questions presented are similar to those here.

The case of *Habersham at Northridge v. Fulton County, et al*, No. 86-124, was docketed in this Court on July 28, 1986, in which extensive questions on the regulatory taking issue are presented.

It would seem prudent to grant review in the instant case and consider it as a companion case to these cases to insure that a reviewable judgment is before the Court so as to decide the important federal question of the regulatory taking—presently a much unsettled issue.

This case is ripe for consideration as the court erroneously concluded that under Section 53, which cannot be used to change a zoning classification, (Appendix "3-4B") the owners could get an appropriate variance. Section 65 would require another rezoning application for another use. The Petitioner/Owners cannot constitutionally be put to a guessing game as to what other zoning uses the zoning authority might permit, once an authoritative decision has been made to apply a specific classification or to do a

vain thing before their constitutional claims may be heard, while their property is restricted to a totally unproductive use without compensation.

As a condition to the proposed rezoning, the owners offered to restrict the development to 126 units, which calculates to between four and five units per acre, conditioned on the accuracy of a survey. This was the lowest density that would permit a proper economically feasible development, which would include the building of a sewage treatment facility and common water facilities. (Appendix "C") Section 65 would permit a development of 5.5 units per acre in addition to commercial uses. (Appendix 5B).

In misapplying *Williamson*, the lower court misunderstood or overlooked the issues before it when it noted that the Plaintiffs have not availed themselves of the Section 53 and Section 65 procedures "but have insisted upon a rezoning of its land and all similarly-situated land to the R-3 classification." The Plaintiffs sought only a rezoning of their property to the R-3 classification. They did not seek the rezoning of "all similarly-situated land". The Plaintiffs' equal protection claim was based on facts demonstrating that similarly-situated land had been rezoned to the R-3 classification, without any conditions, which would permit the development of up to nine units per acre—twice that which the Plaintiffs had agreed to accept as a condition of their zoning.

The Arizona Supreme Court has decided that the proper remedy for a temporary unconstitutional taking of a landowner's property by means of a confiscatory zoning ordinance is money damages. The Arizona high court, in reaching its decision, was influenced by the statement in Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. The City of San Diego*, supra:

> "Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken." *Corrigan v. City of Scottsdale*, Arizona S.Ct., No. 18239-PR, Dec'd. 6/2/86 (Appendix E)

2. As to Injunctive and Declaratory Relief, the Courts Below Decided a Federal Question in a Way in Conflict with Applicable Decisions of this Court.

Regardless of the Petitioners' claim for money damages, clearly the evidence submitted on summary judgment demanded a finding that the Plaintiffs were entitled to a declaratory judgment declaring the Zoning Ordinance unconstitutional as applied and to an injunction enjoining the Defendants to process for development all lawful permits required for the reasonable development of their property.

In *Williamson*, relied on by the lower courts to dismiss Plaintiffs' Complaint, a mandatory injunction was granted requiring the local authorities to permit the development of the property in question under the Ordinance in effect at the time the project was initiated. That issue was not appealed and now stands as the law of the

Sixth Circuit. *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F2d. 402,404 (1984).

If a zoning ordinance is unreasonable, it must be set aside. *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). The Supreme Court in *Nectow*, in upholding the granting of a mandatory injunction for the processing of development purposes for uses other than those permitted under the zoning ordinance, did so noting:

> "That no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of property."

A police power ordinance can only be exercised in a reasonable manner to accomplish a lawful end of a compelling state interest. *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). A zoning ordinance cannot be exercised in an arbitrary and capricious way, cannot be unreasonable, and cannot be confiscatory. *Euclid v. Ambler Realty Co.*, 277 U.S. 366, 71 L.Ed. 303 (1926). If the restrictions are unduly burdensome, the ordinance is unconstitutional as applied. *Loretto v. Teleprompter of Manhattan, CATV Corp.*, 102 S.Ct. 3164, 458 U.S. 419, 73 L.Ed.2d 868 (1982).

The decisions of the Court below to, in effect, deny Petitioners' Motion for Summary Judgment as to declaratory and injunctive relief, ignored the three factors which the Supreme

Court has identified as having "particular significance" in deciding when a taking occurred. *Connolly v. Pension Benefit Guaranty Corp.*, 478 U.S. _____, 89 L.Ed.2d 166, 178-179, 106 S.Ct. _____ (1986).

This Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) in noting that properties are held under the implied limitation of police powers said:

> "But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all instances, there must be an exercise of eminent domain and compensation to sustain the act."

What was said by this Court in *Mahon* as to the right to mine coal may be paraphrased to the right of the ownership of property in the instant case as follows:

> "What makes the right to own property valuable is that it can be developed for a profit. To make it commercially impractical to develop it profitably has very nearly the same effect for constitutional purposes as appropriating or destroying it."

Also, the denial of the Petitioners' claim in this case underscores the dangers foreseen by this Court in *Mahon* when discussing the seemingly absolute protection to property guaranteed by the Fifth and Fourteenth Amendments, it said:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and

> more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

This tendency cannot be demonstrated any more emphatically than by the Trial Court's findings in its Order:

> "The Defendants contend that they carefully considered, as provided by law, the Plaintiffs' application for rezoning and their claim for damages and their denial was a legitimate exercise of their legislative authority as a governing board of the County."

The purpose of § 1983 is to bring those tendencies under constitutional control. In *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 1705, 92 S.Ct. 2151 (1972) it was held:

> "The very purpose of § 1983 was to impose the federal courts between the states and the people, as guardians of the people's federal rights . . . to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'. . . . In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in 1983 actions by expressly authorizing a suit in equity as one of the means of redress."

What happened to the Plaintiffs' claim of the unconstitutional zoning classification of their property?

This highlights another unsettled federal issue which should be decided by this Court. What quantum of proof is necessary to establish the "substantial relation" test of police power restrictions as to the public health, safety, morals or general welfare pronounced by this Court in *Nectow v. Cambridge*, supra? That

question gave the Georgia Supreme Court some concern in *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975) when it decided:

> "As the individual's right to the unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable."

In a footnote in *Barrett*, the Georgia Supreme Court noted:

> "Though following its pronouncement in *Nectow* of a 'substantial' relation test, the Supreme Court has not further construed this term, it appears that 'substantial' is more or less synonymous with 'reasonable' (because the reasonableness of zoning on all the facts is the ultimate inquiry) and is clearly more than 'any' evidence." (235 Ga. 265)

Georgia has joined a majority of the states in holding that zoning ordinances being in derogation of the common law must be strictly construed. *Fayette County v. Seagraves*, 245 Ga. 196, 264 S.E. 2d 13 (1980) In that light and in light of the warning of this Court in *Mahon*, this Court should pronounce that the quantum of proof necessary to support the "substantial relation" test is one of strict construction requiring clear and convincing evidence.

3. Review Should be Granted to Resolve Conflicts Between the Circuits as to Regulatory Takings.

The Eleventh Circuit Court of Appeals decision in the instant case conflicts with the decisions of other courts of appeals on the

same matter. Other courts of appeals have rendered conflicting opinions on the same or similarly related subject matters which should be reconciled by this Court in its general powers of supervision.

The Eighth Circuit has rendered opinions that the Fifth Amendment by the Just Compensation Clause requires compensation to an owner whose property has been temporarily "taken" by a zoning ordinance during the interim in which government effected the taking, calculated on a rate of return necessary to place the owner in as good a position pecuniarily as if the property had not been taken. *Nemmers v. City of Dubuque*, 764 F.2d 502 (1985)

The *Nemmers* court based its decision on *San Diego Gas & Electric v. San Diego*, dissenting opinion, and *Kimball Laundry Co. v. United States*, 338 U.S. 1,5, 69 S.Ct. 1434, 1437, 93 L.Ed. 1765 (1945).

Although reversed on procedural grounds, the Sixth Circuit in *Hamilton Bank v. Williamson County Regional Planning Commission*, 729 F.2d 402, 408, adopted the procedures for "taking" cases prescribed in the dissenting opinion in *San Diego Gas & Electric Co.*

The Ninth Circuit also adopted the *San Diego* dissenting opinion. *Martino v. Santa Clara Water District*, 703 F.2d 1141, 1148, (9th Cir. 1983), as noted in footnote 2 in *Nemmers*.

The Eleventh Circuit in *Hernandez v. City of Lafayette*, 643

F.2d 118, (5th Cir. 1981), held that damages would lie under the Civil Rights Act in favor of any person whose property is taken for a public use without compensation through a zoning ordinance which denies the owner an economical viable use thereof, the measure being the value of the property during the period of the taking.

The District Court accepted the County's contentions that the consideration of the Plaintiffs' constitutional claims was performed in an exercise of the legislative authority as the governing body of the County. (Appendix "3A") That finding is in conflict with *Hornsby v. Allen*, 326 F.2d 605, CA 5 (1964), which outlined in detail the distinction between the legislative and judicial functions of local governing bodies.

4. The Court Below Decided a Federal Question in Conflict With a State Court of Last Resort.

In holding that Plaintiffs' claim was not ripe for adjudication because they had not applied for a variance and had not applied for rezoning for a planned unit development, the lower courts decided the substantive due process required under the Fourteenth Amendment to the Constitution of the United States, contrary to that decided by the Supreme Court of Georgia, which has held that the only issue before the courts in zoning matters is the constitutionality of the ordinance as applied, not other uses.

In *DeKalb County v. Flynn*, 243 Ga. 679, 256 S.E. 2d 362 (1979), the Georgia Supreme Court, in considering the challenge

of a zoning ordinance as being unconstitutional and in applying the "substantial relation to the public health, safety, morality or general welfare" test in *Nectow* held:

> "We add that the county has the duty and obligation to work with property owners to allow them the highest and best use of their property, by considering on its own motion ways in which the county's objections to a proposed development could be eased by county action. Contrary to DeKalb County's position throughout this litigation, the burden is not on the applicant for rezoning to anticipate and counter every conceivable objection which the County might raise."

In considering the constitutional reasonableness of a zoning ordinance under the decisions of the Georgia Supreme Court, based on an interpretation of the Fourteenth Amendment to the United States Constitution and the decision of this Court in *Nectow* the Georgia Supreme Court held:

> "The function of the trial court in a zoning appeal is to determine if the present zoning is constitutional, not to scrutinize any other proposed uses. In this case, the trial court evaluated the specific proposed use of the land rather than reviewing the constitutionality of the present zoning classification.
>
> "A review of the extensive record in this case produces no evidence which supports the use of the subject property as presently zoned. Rather, the evidence presented demands a finding that the present zoning amounts to an unconstitutional deprivation of the owners' property." *Village Centers, Inc. v. City of Atlanta,* 244 Ga. 43, 257 S.E. 2d 894 (1979)

The Georgia Supreme Court in *Village Centers v. DeKalb* ,248 Ga. 177, 281 S.E. 2d 522 (1981), in applying the question of federal law set out in *Euclid v. Ambler Realty Company,*272 U.S.,

365, 386, 47 S. Ct. 114, 71 L.Ed. 303 (1926) held that when a zoning ordinance is challenged as being unconstitutional as applied instead of as a whole, the only issue before the court is the constitutionality of the ordinance as applied. In rejecting the owner's argument that *Euclid v. Ambler Realty Co.*, supra, did not require the filing of an application for rezoning as a condition precedent to the suit in equity, the Georgia Supreme Court held that before litigants could seek a declaration by a court of equity that a zoning ordinance is unconstitutional as applied, they must apply to the zoning authorities for relief by rezoning. Once that has been done, the decision of the zoning authority is final. All administrative procedures have been exhausted, and a suit in equity must be filed within thirty (30) days of that decision.

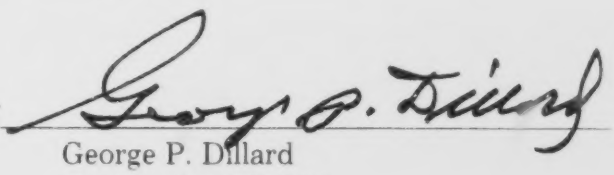
Since § 1983 has no statute of limitations, the petitioners in the case at bar filed their Complaint in the District Court within the thirty (30) day period. Had they filed another petition for rezoning or for variance as the lower courts suggested, the petitioners would have lost their right to further complain as to the constitutionality of the ordinance as applied, restricting the property to agricultural and vacation cottage uses.

In applying the weighing test and the suggested lines of inquiry pronounced by the Georgia Supreme Court in *Barrett v. Hamby*, 235 Ga. 262, 219 S.E. 2d 399 (1975); *Guhl v. Holcolmb Bridge Road Corp.*, 238 Ga. 322, 232 S.E. 2d 830 (1977), which were based on an interpretation of the Fourteenth Amendment

and the decision of this Court in *Nectow*, the Georgia Supreme Court has held that the failure of the zoning authorities to apply such factors to a zoning ordinance when its constitutionality has been challenged is a denial of substantive due process. The owner is entitled to have the zoning restriction considered in relation to the impact of the zoning decision upon the property owners' rights. "A failure to afford this scrutiny" amounts to a denial of due process. *Bobo v. Cherokee County*, 248 Ga. 554, 285 S.E. 2d 177 (1981); *Sellars v. Cherokee County, Ga.*, 254 Ga. 496, 330 S.E. 2d 882 (1985).

Respectfully submitted,

DILLARD, GREER, WESTMORELAND
& WILSON, P.C.

BY 

George P. Dillard
Ga. Bar No. 222000

APPENDIX

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8976
Non - Argument Calendar

JOHNNY M. IRVIN AND DAVID L. IRVIN,

Plaintiffs-Appellants,
Cross-Appellees,

versus

RABUN COUNTY, GEORGIA; VIRGIL P. LEDFORD, DR. RICHARD J. TURNER, MAX WATTS,
Individually and as Chairman and Members of the Board of Commissioners of Rabun County, Georgia,

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(June 12, 1986)

Before GODBOLD, Chief Judge, HILL and VANCE, Circuit Judges.

PER CURIAM:

The decision appealed from is AFFIRMED on the basis of the Order of Court of Honorable Charles A. Moye, Jr., United States District Judge, dated and filed December 3, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

JOHNNY M. IRVIN AND
DAVID M. IRVIN,
Plaintiffs,

CIVIL ACTION NO. C84-179G

v.

RABUN COUNTY, GEORGIA;
VIRGIL LEDFORD, DR. RICHARD
TURNER, MAX WATTS,
Individually and as Chairman and
Members of the Board of Commissioners of
Rabun County, Georgia,
Defendants.

ORDER OF COURT

The above-styled action is before the Court on cross motions for summary judgment. For the following reasons, this case is DISMISSED for lack of subject matter jurisdiction.

On December 31, 1984, the plaintiffs filed this case in the United States District Court for the Northern District of Georgia, Gainesville Division, asserting claims under the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs are seeking declaratory and injunctive relief for the alleged deprivation of their civil rights under 42 U.S.C. § 1983, together with the costs of litigation and attorney fees under 42

U.S.C. § 1988.

In addition to their federal consitutional claims, the plaintiffs urge this Court to assume pendent jurisdiction over their state constitutional claims. The plaintiffs are seeking damages allegedly resulting from the denial by the Rabun County Board of Commissioners of the plaintiffs' application for the rezoning of some 26.33 acres of land located on and adjacent to Lake Rabun in Rabun County, Georgia. The plaintiffs further pray for a preliminary injunction against the defendants seeking to enjoin the continuation of an allegedly unconstitutional zoning ordinance which denies plaintiffs the economic benefit of the use of their property.

On the same date this case was filed in the district court, the plaintiffs filed a civil action in the Superior Court of Rabun County seeking substantially equivalent relief to that which they seek from this Court. The plaintiffs subsequently dismissed the state action leaving only the district court action herein pending. In answer to this action, the defendants have denied any unconstitutional application of the Rabun County zoning ordinance. The defendants contend that they carefully considered, as provided by law, the plaintiffs' application for rezoning and their claim for damages and that their denial was a legitimate exercise of their legislative authority as a governing board of the county.

The property in question is presently zoned "Vacation District" Cottage (7.53 acres) and "Agricultural District" (18.83

acres), which permits the establishment of residences at a density of 15,000 square feet per family in the vacation cottage zone and 20,000 square feet per family in the agricultural zone. The plaintiff is seeking to have the area rezoned to an R-III classification which would permit a density of up to one family per 4,500 square feet, thus allowing multiple family structures to be built upon the property.

The plaintiffs' original application for rezoning was approved by the Planning Commission by a 3 to 2 vote, with the Chairman of the Commission casting the deciding vote. However, at a regularly scheduled meeting of the County Commission on July 12, 1984, the County Commission denied the plaintiffs' application for rezoning. The plaintiffs reapplied in November of 1984. Once more, the application was approved by a 3 to 2 vote by the Planning Commission only to be rejected by the County Commission following a public hearing during its regularly scheduled meeting of December 13, 1984. Following the second denial of their application, the plaintiffs instituted this lawsuit.

Section 53 of the Rabun County Zoning Ordinance provides that a property owner under any zoning classification may apply for a variance from the terms and provisions of the Ordinance under certain conditions. Section 65 of the Ordinance provides a procedure for an application for a planned unit development to accommodate specific development proposals. Although the plaintiffs have specific development plans, it is undisputed that

they have availed themselves of neither of these procedures but have insisted upon a rezoning of its land and all similarly situated land to the R-III classification. Under these circumstances, in light of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, _____ U.S. _____, 105 S.Ct. 3108 (1985), this Court feels that the plaintiffs' taking claim is not yet ripe for resolution.

As the *Williamson* Court made clear, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 105 S.Ct. at 3117. In *Williamson*, as in this case, the plaintiff's application for rezoning had been denied; however, the plaintiff failed to avail itself of procedures (i.e., seeking a variance or a waiver from existing restrictions) which might have led to "a mutually acceptable solution. . . , thereby obviating any need to address the constitutional questions." *Id.* (quoting from *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297 (1981)). Under these circumstances, the Court held that the plaintiff had not yet obtained a final decision regarding how it would be allowed to develop its property, 105 S.Ct. at 3119, and, therefore, the plaintiff's claim was premature. The fact that the plaintiffs in the current action have asserted claims predicated upon 42 U.S.C. §1983 and the Due Process Clause of the

Fourteenth Amendment is of no import. *See id.*

It is well-established that a determination by this Court that a question is not ripe for resolution strikes at the core of whether or not there exists a "case or controversy" under Article III of the Constitution. Absent the fruition of an actual case or controversy, this Court cannot speculate about any potential harm which the plaintiffs might suffer if this application for a waiver or variance is denied. Federal courts do not render advisory opinions. *See, e.g., United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). Accordingly, having made the decision that the plaintiffs' claim is not ripe for resolution, this Court hereby orders that this case be DISMISSED for lack of subject matter jurisdiction. This is a final order.

SO ORDERED, this 3rd day of December, 1985.

S/ Charles M. Moye, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX "B"

The Rabun County Zoning Ordinance, which restricts 18.83 acres of the property in question to an agricultural use, permits the following uses in that district:

"Section 91: Agricultural District A

" 1. Farm residences, including quarters for migrant farm workers.

" 2. Non-farm residences with a minimum lot size of 20,000 square feet.

" 3. All agricultural and forestry uses, including boiler, poultry, and other livestock raising.

" 4. Customary and essential accessory buildings and uses including barns and other livestock structures, storage sheds, implement sheds, roadside stands for the sale of produce raised on the farm and the like.

" 5. Churches and campgrounds.

" 6. Cemeteries: Provided approval is granted by Planning Commission and the County Commission.

" 7. Public and semi-public buildings and land uses.

" 8. Public and semi-public recreation facilities and grounds.

" 9. Commercial recreation facilities and grounds.

"10. Signs advertising the sale, lease or rental of property on which they are located when located at least fifty feet from road right-of-way.

"11. Mining operations.

"12. Sanitary landfills and dumps approved by the County Commissioners after review with the County

Health Officer.

"13. Quasi-Public Services Uses: Utility company facilities on premises which are necessary for the convenience and general welfare of the public such as telephone exchanges, pump houses, transformer substations, pressure reducers, cable easements, etc. Such structures shall be architecturally harmonious with the general character of the surrounding area, shall be enclosed by proper fencing, and shall be suitably landscaped.

The Rabun County Zoning Ordinance as applied restricts 7.53 acres of the tract in question to "vacation cottage", which permits the following uses:

"Section 64. Vacation Cottage District (V-C)

"1. Single Family residences.

"2. Residential Mobile Homes.

"3. Non-commercial greenhouses.

"4. Municipal, county, state and other public uses, including parks, and playgrounds.

"5. Churches, provided that they:

"a) are placed not less than 50 feet from any property line;

"b) create required off-street parking spaces; and

"c) are separated by a planted buffer strip at least ten (10) feet in width.

"6. Accessory buildings provided such shall be permitted only in a rear yard and shall be not less than ten (10) feet from any property lines.

"7. Any form of horticulture or agriculture.

"8. Static electrical transformer stations and gas regulator stations if essential for the service of the immediate area and subject to the following conditions: Such uses shall be enclosed within a woven wire fence, shall be suitably landscaped and the storage of vehicles and equipment on the premises shall be prohibited.

"Section 53. Variances

"The Board of Commissioners of Rabun County, Georgia may, upon the recommendation of the Rabun County Planning Commission, grant variances from the terms and provisions of this Ordinance under the following provisions:

"1. No such variance shall change the zoning or use classification of such property.

"2. No such variance shall permit a use of such property that is not otherwise permitted in its zoning classification.

"Section 65. Planned Unit Development

"65.1 General Character:

"Purpose: It is the intent of this Section 65 to:

"1. Encourage the develpment of large tracts of land as planned neighborhoods or communities;

"2. encourage flexible and creative concepts in site planning;

"3. preserve the natural amenities of the land by encouraging scenic and functional open areas within residential areas;

"4. accomplish a more desirable environment than would be possible through the strict application of minimum requirements of the Ordinance;

"5. provide an environment of stable character compatible with surrounding residential areas.

"Within the planned area, a variety of land uses may be permitted in an orderly relation to one another and to existing land uses, as well as with due regard to comprehensive planning in Rabun County."

65.4 Use, Density and Other Regulations:

1. **Permitted Uses**

The uses permitted within the Planned Unit Development shall be primarily residential in character, and may include the following uses:

"a) Single-family detached dwellings,

"b) Single-family attached dwellings, townhouses, duplexes, or similar types,

"c) Multi-family dwellings,

"d) Churches, schools, community or club facilities, and similar public or semi-public facilities, including recreational facilities,

"e) Commercial or retail uses, including offices and clinics provided that they meet the following criteria:

"1. The location is appropriate in relation to other land uses.

"2. The proposed use is designed so that it will primarily serve the planned developments.

f) Accessory uses to those listed above.

g) Mobile homes and modular homes are specifically prohibited in Planned Unit Develpments.

"2. **Density Controls**

The maximum number of dwelling units per acre in

residential areas of the Planned Unit Development shall not exceed 5.5 dwelling units per acre. For purposes of this section, density shall be interpreted as the number of dwelling units per gross acre devoted to residential development. Gross acreage shall include, in addition to land area and parcels used primarily for residential purposes all open spaces including private lakes reserved for common usage within the Planned Unit Development and held under private or condominium ownership. Gross acreage for residential development shall exclude areas reserved or dedicated for street right-of-ways.

APPENDIX "C"

LAW OFFICES

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JANET SMALLEY TODD
WILLIAM WOODSON GALLOWAY

PLEASE REPLY TO
SUITE 375
160 CLAIRMONT AVENUE
DECATUR, GEORGIA 30031

December 11, 1984

Mr. R. Bruce Russell
Rabun County Attorney
P.O. Box 661
Clayton, Georgia 30525

Dear Bruce:

Re: **Application of Johnny M. Irvin and David L. Irvin for rezoning in Land Lot 65 of the 5th District of Rabun County**

It was a pleasure to talk with you with reference to the above application for rezoning and the possibility of placing conditions on the rezoning if granted.

You may be assured that this firm and the owners share your concerns. We do not intend to propose to develop anything that is going to be anything other than an asset to Rabun County.

We all must recognize, however, that the owners have a right to develop and use their property in a manner that is economically feasible, while protecting the health, safety and welfare of the community. The property cannot be kept vacant merely because some people would like for it to remain undeveloped.

I have discussed the conditions we mentioned with the owner and with the planning and construction consultant. While we are

agreeable to keeping the density as low as is economically feasible, our construction consultant informs us that in order to build the sewerage and treatment facilities and the water facilities proposed, we will need a yield greater than three units per acre. The proposed 126 units calculate to 4 to 5 units per acre conditioned on the accuracy of a survey.

Normally for a condition of a zoning ordinance to be enforceable, it must be definite; therefore, density is normally expressed in units per acre overall.

The owner is agreeable to restricting the development to 5 units per acre. This is a reduction from 9 units per acre, the maximum under R-3. This would, also, accomplish the feasibility goal of 126 units, more or less, depending on the final acreage reflected by an up-to-date survey.

As a compromise and to ameliorate some of the concerns of the public, I would propose the following conditions be placed on the R-3 zoning if granted:

1. The property shall not be developed to an overall density exceeding 5 units per acre.

2. No building shall contain more than 4 units.

3. No building shall exceed two stories in height above the ground level nor protrude above the top of the highest trees on the property.

4. All buildings shall be built along the vacation cottage theme.

5. The owners, at their expense, shall construct and maintain a central water supply, sanitary sewer facilities and a retention pond or ponds to retain surface waters along the general concept as shown on preliminary master plan entitled "Overlook" by Johnny M. and David L. Irvin prepared by Steed Consultants. The owners shall obtain all necessary approvals and permits from the regulatory authorities for these facilities.

6. No mobile home will be placed on the site.

7. The owners, at their expense, will provide the right-of-way and pavement for acceleration and deceleration lanes along the existing road fronting owners' property.

8. The owners will dedicate, at no expense to the County, such right-of-way as may be reasonably necessary for widening and improving Rabun Road.

This communication is to be considered as an offer of compromise, not of settlement, in an effort to arrive at an amicable agreement as to conditions of zoning to avoid litigation.

Should litigation ensue, the owners reserve the right to seek such zoning as may be constitutionally permissible.

Should you, the members of the Board of Commissioners, the attorney representing the opposition, or any group of interested citizens desire to discuss with us conditions of zoning, we will be glad to do so.

Cordially yours,

DILLARD, GREER, WESTMORELAND
& WILSON, P.C

George P. Dillard

GPD:bhf
cc: Each Member of the Board
of Commissioners
Mr. Dennis J. Webb

APPENDIX "D"

EXCERPT FROM DEPOSITION OF VIRGIL LEDFORD, CHAIRMAN, RABUN COUNTY BOARD OF COMMISSIONERS TAKEN MARCH 5, 1985

Q. How long has this property owned by the Irvins been vacant?

A. I really don't know that.

Q. How long have you known it?

A. Well, I really hadn't knowed it too long. I just knowed there was some property in there. I didn't know who owned it.

Q. Do you recall anything ever having been on it — any development?

A. Not that I know of, no, sir.

Q. I believe it's zoned for an agricultural use.

A. Yes.

Q. Do you know whether it has ever been devoted to agricultural use or not?

A. Well, all land is in Rabun County until it's changed, I reckon.

Q. Oh, that's just a zoning that you arbitrarily put on land whether it's agricultural or not; is that correct?

A. It's all agricultural land, yes. It's R-1.

Q. You mean it's zoned agricultural?

A. Yes.

Q. What percentage of the property that's zoned agricultural in Rabun County is actually devoted to agricultural use?

A. I couldn't tell that. There's lots of land. All land was one time agricultural use — farming.

Q. Has that moutain side ever been farmed to your knowledge?

A. No. I guess not. I don't know, but I guess not, because most of the mountains are not farmed. They're just used — when I was a kid, they were just used to hold the land together. It was just to hold the land together.

Q. That's the purpose you think it still ought to be put to — just to hold the land together?

A. It wouldn't hurt, I'll tell you — the way people is coming in here.

Q. Tell us about the way people are coming in and where are they coming?

A. Oh, they're coming in from everywhere, I guess. I don't know.

Q. Have you had a population increase in Rabun County?

A. Yes, sir.

Q. What extent?

A. I guess in the last 20 years, it has doubled.

Q. And it's still increasing?

A. Yes, sir.

FILED
JUN - 2 1986
DAVID R. COLE
CLERK SUPREME COURT
BY

APPENDIX "E"

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
In Banc

JOYCE M. CORRIGAN,
Plaintiff-Appellant,
v.
CITY OF SCOTTSDALE, a municipal corporation,
Defendant-Appellee.

Supreme Court
No. 18239-PR

(Court of Appeals
No. 1 CA-CIV 6300)

Appeal from the Superior Court of Maricopa County
Case No. C-359908
The Honorable James Moeller, Judge

REMANDED

Opinon of the Court of Appeals,
Division One, filed 28 February 1985
Affirmed in Part
Vacated in Part

Fennemore, Craig, von Ammon, Udall & Powers by James Powers, Timothy Berg, and Jane Nicoetti-Jones Attorneys for Plaintiff-Appellant	Phoenix
William E. Farrell, Scottsdale City Attorney	Scottsdale
Schorr, Eldridge and Bangs By S. L. Schorr and Frank S. Bangs, Jr.	Tucson
Lewis & Roca By John P. Frank and Michael O. Miller Attorneys for Defendant-Appellee	Phoenix

CAMERON, Justice

This is a petition for review of an opinion of the court of appeals, which reversed the trial court judgment in favor of the City of Scottsdale and declared its zoning ordinance void as an unconstitutional taking of Ms. Corrigan's property without just compensation. Corrigan v. City of Scottsdale, _____ Ariz. _____, _____ P.2d _____ [1 CA-CIV 6300, filed 28 Feb. 1985]. We have jurisdiction pursuant to art. 6 § 5(3) of the Arizona Constitution, A.R.S. § 12-120.24 and Rule 23, Ariz. R. Civ. App. Proc., 17A A.R.S..

The only issue to be decided on review is whether a landowner is entitled to money damages for a temporary taking of property by reason of an invalid zoning ordinance.

The facts follow. Ms. Corrigan owns 5,738 acres of undeveloped land, which is made up of three contiguous parcels. The largest parcel of land is approximately 4,800 acres; a smaller parcel of 608 acres adjoins the large parcel in a single point, at its northwest corner. A third parcel of approximately 330 acres connects with the large parcel, at the large parcel's southwest corner. All of this property is a part of, or close to, the McDowell Mountains. This land previously had been part of the D.C. Ranch, owned by Corrigan's father and E. E. Brown. Ms. Corrigan obtained her part of the property by purchase for two million dollars from Brown's children.

In 1963, the City of Scottsdale (city) annexed the southern

part of the DC Ranch, including the land involved herein. The McDowell Mountains thus became the only hilly or mountainous terrain within the city limits. The land was zoned by the city as R-1-35 which allows one single family residence on a lot of at least 35,000 square feet.

Later in 1977, the city, in accordance with its earlier general use plans, added sections 6.800 through 6.807 to its zoning ordinance thus creating the Hillside District. This ordinance established two areas, the Hillside Conservation Area and the Hillside Development Area. The two areas are divided by a "no development" line. This line is located wherever one of the following conditions is first encountered: unstable slopes subject to rolling rocks or landslides; bedrock areas; slopes of 15 percent or more; or shallow, rocky mountain soils subject to severe erosion. This line under certain conditions may be adjusted to where two of the enumerated conditions are present. The Conservation Area,

which is all land above the "no development" line, is to be used solely for the conservation of open space with the land legally secured for such conservation by easement or dedication. The Development Area may be developed with some limitations, such as retaining a fixed minimum percentage of the land in its natural state. Finally, the ordinance provided density credits for the land in the Conservation Area which may be transferred to contiguous

land in the Development Area.[1]

The Hillside District ordinance did not affect Ms. Corrigan's two smaller parcels of land; however, 3,836 acres or 80 percent of her 4,800 acre parcel is in the Conservation Area. Assuming that all possible adjustments in the "no development" line were made, 3,523 acres or 74 percent of this land would still remain in the Conservation Area.

Ms. Corrigan filed suit seeking a declaration that the ordinance was unconstitutional and further claiming money damages for the temporary taking of her property. Ms. Corrigan did not submit a development plan to the city either prior to or after filing the suit. The trial court entered findings of fact and conclusions of law that the ordinance was constitutional and that no taking of Ms. Corrigan's property had occurred. Accordingly, it dismissed the claim for damages.

The court of appeals reversed, stating that an unconstitutional taking without just compensation of Ms. Corrigan's land had occurred under both the United States and Arizona Constitutions. Corrigan v. City of Scottsdale, slip op. at 27. Further,

[1]Density credits are also known as transferable development rights. An ordinance, such as the one in this case, "provides that development which is prohibited on one parcel of land may instead be applied to other parcels, allowing these other parcels to be developed to a greater extent than zoning normally would allow." Note, The Transferability of Development Rights, 53 U.Colo.L.Rev. 165, 165 (1981). Thus, Ms. Corrigan may now build in the Development Area alone the same number of housing units that she could previously build before the ordinance in the Conservation and Development Areas combined. We express no opinion as to the legality or constitutionality of this scheme.

the appeals court held that the transfer of density credits could not constitute just compensation under the Arizona Constitution, as the Arizona Constitution requires payment of a judicially determined amount of money as compensation for such a taking. *Id.* Nevertheless, the appeals court upheld the dismissal by the trial court of the damages claim based on Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (App. 1978), *cert. denied*, 442 U.S. 942, 99 S.Ct. 2885, 61 L.Ed.2d 312 (1979), which held that the sole remedy for confiscatory zoning is invalidation of the ordinance and not money damages. Slip op. at 27, n. 14. This court granted Ms. Corrigan's petition for review to determine whether the remedy for a temporary unconsitutional taking of a person's property by virture of a confiscatory zoning ordinance should be so limited.

SHOULD DAMAGES BE RECOVERABLE?

The issue of monetary damages for a regulatory "taking" of property without just compensation is not well settled in land use law. The United States Supreme Court has failed to decide this precise question on several occasions: Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, _____ U.S. _____, 105 S.Ct. 3108, _____ L.Ed.2d _____

(1985). In fact, at this writing, it is set to examine the issue once again. *See* MacDonald, Sommers & Frates v. County of Yolo [3 CIV 22306 Cal.Ct.App., 3d Dist. unpublished opinion filed 24 January 1985], *cert. granted*, 54 U.S.L.W. 3263 (21 October 1985, No. 84-2015). As there is no definitive interpretation on this issue under the Fifth Amendment of the United States Constitution, we will rely on the Arizona Constitution. A state constitutional analysis of this question is not unusual, *see* Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15, 22 (1981), and is quite appropriate in light of our unique constitutional provision.

Article 2 § 17 of the Arizona Constitution provides in part:

> No private property shall be taken or damaged for public or private use without just compensation having first been made. . .[and] until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury. . .

This provision, like the Fifth Amendment, prohibits a taking of property without just compensation but unlike the Fifth Amendment, specifically requires compensation for a taking to be made by a payment of money in a judicially determined amount. In the instant case, the court of appeals held and we agree that the Hillside Ordinance does "constitute a taking of property for which just compensation must be made." Corrigan v. City of Scottsdale, slip op. at 27. Thus the next step, under the Arizona Constitution, should logically be the imposition of money damages.

Nevertheless, the appeals court upheld the trial court's dismissal of the money damages claim based on Davis v. Pima County, *supra*.

In *Davis*, the court of appeals stated:

> When a zoning ordinance is confiscatory it results in a "taking of the property and is, in effect, the exercise of the power of eminent domain."
>
> * * *
>
> However, *though appellants established a "taking" if the board's action were not undone,* this does not mean they are entitled to money damages. * * * The proper remedy when zoning is confiscatory is either to seek by declaratory judgment to invalidate the general zoning ordinance or to challenge the particular rezoning determination by means of a special action.

121 Ariz. at 345, 590 P.2d at 461. (emphasis added) (citations omitted). We do not agree. Admittedly, a zoning body should not have its ordinance invalidated and then have to pay full fair market value condemnation type damages based on a permanent taking. "[N]othing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value, where the "taking" already effected is temporary and reversible. . . " San Diego Gas & Electric v. City of San Diego, 450 U.S. at 659, 101 S.Ct. at 1307, (BRENNAN, J., dissenting). However, once an unconstitutional taking is shown, a person should receive damages for the time in which the confiscatory zoning ordinance has "taken the property", that is the time between the taking and the invalidation of the ordinance.

> [O]nce a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

San Diego Gas & Electric v. City of San Diego, 450 U.S. at 654, 101 S.Ct. at 1305 (BRENNAN, J., dissenting) (citations and footnotes omitted). We believe that once a taking is found, the Arizona Constitution mandates the payment of money as damages for any injury suffered. Ariz. Const., art. 2 § 17. We agree with the simple logic expressed by Justice Brennan in his San Diego Gas & Electric v. City of San Diego dissent:

> Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.
>
> * * *
>
> If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's recission of it. The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken.

450 U.S. at 656-57, 101 S.Ct. at 1306, (BRENNAN, J., dissenting) (citations and footnotes omitted).

We are not alone in holding that a landowner may recover

damages for a temporary taking by zoning. In a case where the plaintiff-landowner's Waterway Development Permit application was denied because the city "sought to impose a servitude upon the property to preserve 'the natural and traditional character of the land and waterway'", the Texas Supreme Court stated, "[t]here was no suggestion that government may take or hold another's property without paying for it, just because the land is pretty. Our conclusion is that the City of Austin was liable in damages to the plaintiffs." City of Austin v. Teague, 570 S.W.2d 389, 394 (Tx. 1978).

In New Jersey, it has been flatly held that "[t]emporary takings are compensable." Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46, 73 (1982).

In a case where the City of Lincoln zoned the plaintiff's land for public use and clearly intended to use the land for a school and other government buildings, the North Dakota Supreme Court stated:

> We believe [the compensation remedy proposed by Justice Brennan] for cases involving a regulatory taking constitutes not only a legally correct analysis of the "taking" involved but also provides a practical and fair solution for all parties. If a landowner proves that governmental regulation has deprived him of all reasonable use of his property, he is entitled to receive just compensation.

Rippley v. City of Lincoln, 330 N.W.2d 505, 511 (N.D. 1983).

More significantly, in a case very similar to the one before us the New Hampshire Supreme Court not only allowed damages

for a temporary taking but also reasonable attorneys fees and double costs. Burrows v. City of Keene, 121 N.H. at 601-602, 432 A.2d at 22. In *Burrows*, the city not only failed to approve the plaintiff's subdivision plans but further, as in this case, zoned 109 acres of the plaintiff's land into a conservation area. 121 N.H. at 595, 432 A.2d at 17. The court rejected cases like Agins v. Tiburon, *supra*, and Davis v. Pima County, *supra*, which limit a landowner to invalidation by stating:

> [T]he owner's property has been taken during the interim period and he is entitled to compensation for that taking. Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens accompanying "progress" upon individual landowners rather than the public at large. The allowance of damages... during the period of the taking, however, should encourage such officials to stay well on the constitutional side of the line, . . .

Burrows v. City of Keene, 121 N.H. at 599, 432 A.2d at 20 (citations omitted).

We note that the reasons generally given for denying damages are that: (1) it usurps a legislative function; (2) it threatens substantial fiscal liability on local governments; and (3) it would inhibit governmental land planning. Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. Rev. 711, 725 (1982). *See also* Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. 612,

643-644 (1983). We believe these reasons do not justify such a rule.

First, since zoning is an exercise of the police power, it is often deemed a legislative function. Davis v. Pima County, 121 Ariz. at 345, 590, P.2d at 461; Note, *supra* at 725. Thus some argue that the awarding of damages deprives the legislative body of being the one to decide whether the regulation is appropriate in light of the fact that compensation will be paid. Such an argument misses the point. No legislative prerogative is usurped by awarding damages for the time the property was temporarily taken under an invalid zoning ordinance. The regulating body can still weigh all the relevant considerations and determine for itself how best to effectuate its policy in the future. The same alternatives are open to them after a remedy of invalidation plus temporary damages as exist after invalidation alone. The legislative body may pay to acquire the land outright, agree to pay the landowner a certain amount in order to continue the regulation, or simply abandon the regulation altogether. All that is added by an award of temporary damages is that the landowner is compensated for losses that he has already suffered by virtue of the unconstitutional taking. *See* San Diego Gas & Elec. v. City of San Diego, 450 U.S. at 656-657, 101 S.Ct. at 1306; Note, *supra* at 725-729.

Second, fears of fiscal liability did not stop courts from limiting or abolishing municipal sovereign immunity and likewise

should not bar a person's constitutionally guaranteed compensation for the impermissible taking of his property. *Id.* at 726-727. Further, fiscal liability may be an incentive for responsible public planning. In this we note that a local government will not be liable for any substantial liability unless it irresponsibly imposed staggering losses onto a private citizen by its land regulation. D. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases,* in *1982 Zoning and Planning Law Handbook* 201 (F. Strom.ed. 1982) (also found in Zoning & Plan.L.Rep. v. 4, n.6 (June 1981)).

Finally, we do not believe that advocating responsible governmental planning is the same thing as inhibiting governmental planning. Public officials should consider their actions before enacting them. Mere invalidation does not provide any incentive for public planners not to experiment at an individual property owner's expense. Neither does invalidation provide any deterrent impact; instead the city can and often does enact another similarly restrictive regulation and force the landowner to undergo another costly litigation battle.[2] Without a damages

[2]We borrow a portion of a footnote from Justice Brennan's dissent in San Diego Gas & Elec. v. City of San Diego because of its obvious relevance:

> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

remedy, invalidation alone is a toothless tiger "capable of great roars about constitutional property rights but ineffectual in guarding against even obvious excesses resulting from multiple regulation." Note, *supra* at 734.

The policy reasons in favor of denying damages are not persuasive. Governmental entities should be as mindful of a person's constitutional rights as anyone else. Therefore, under our constitutional provision requiring a payment of money for an unconstitutional taking of a person's property, we hold that invalidation is not the sole remedy, and the landowner is entitled to money damages from the time the regulation was protested or

[2] (continued)

> "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.
>
> "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 C.3d 110, [109 Cal.Rptr. 799, 514 P.2d 111] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
>
> * * *
>
> "See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good Luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original).

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. at 656, n.22, 101 S.Ct. at 1306, n.22 (BRENNAN, J., dissenting).

challenged. Statements in *Davis* which prohibit any recovery of money damages for a regulatory taking, by a confiscatory zoning ordinance, are overruled.

THE PROPER MEASURE OF DAMAGES

Having determined that money damages are recoverable for a temporary taking by reason of an invalid zoning ordinance under art. 2 § 17 of the Arizona Constitution, we must now determine how those damages should properly be measured.

There has been extensive legal writing on the subject of how damages should be measured for a temporary taking. *See generally* D. Hagman & D. Misczynski, *Windfalls for Wipeouts* (1978); Johnson, *Compensation for Invalid Land-Use Regulations*, 15 Ga. L. Rev. 559 (1981); D. Hagman, *Temporary or Interim Damages Awards In Land Use Control Cases, supra;* Wright, *Damages or Compensation for Unconstitutional Land Use Regulations, supra.* From these and many other writings have emerged "five basic rules for measuring damages: rental return, option price, interest on lost profit, before-after valuation (two alternatives), and benefit to the government." D. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases* in *1982 Zoning & Planning Law Handbook* at 218-227.

Each of these damage measures works well in some "taking" cases and inequitably, if at all, in others. This is because no one

rule adequately fits each of the many factual situations that may be present in a particular case. Such problems as: whether the losses are speculative; when the taking actually occurred; whether it caused any damage; and whether it was an acquisitory or nonacquisitory setting combine to make each measure of damages, in some cases a "guessing game" between too little compensation on the one hand and providing a windfall on the other.

Recognizing this problem, we feel the best approach is not to require the application of any particular damage rule to all temporary taking cases. Instead we hold that the proper measure of damages in a particular case is an issue to be decided on the facts of each individual case. It is our intent to compensate a person for the losses he has actually suffered by virtue of the taking. Either the parties may agree to an appropriate damage measure or each may present evidence as to the actual damages in the case and its correct method of determination. The damages awarded and the way to measure those damages thus may be adapted to compensate the party whose land has been taken for his actual losses.

We emphasize, however, that no matter what measure of damages is appropriate in a given case, the award must only be for *actual damages.* Such actual damages must be provable to a reasonable certainty similar to common law tort damages. *See* Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252

(1978). This approach will compensate for losses actually suffered while avoiding the threat of windfalls to plaintiffs at the expense of substantial government liability. Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. at 637-39; City of Austin v. Teague, 570 S.W.2d at 395. In adopting this approach we agree with Professor Wright that:

> Most of the policy arguments in opposition to compensation or damages for regulatory takings are premised on the fear that Draconian liability on local governments will result. However, limiting recovery to a landowner's actual losses where the regulatory taking is temporary should help eliminate the threat of such burdensome liability. This approach adequately balances the public interest against private interests by requiring compensation for regulatory takings while limiting that compensation to actual losses for temporary takings. Such a balance between public and private interests will not be achieved by the extreme approach of denying all compensation for regulatory takings and limiting landowners to injunctive and declaratory relief.

Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. at 645.

Applying this principle of compensation for actual loss caused by a temporary taking to the present case reveals an insufficient record on the damages issue. The evidence of damages presented to the trial court was not focused on what actual losses, if any, were suffered by Ms. Corrigan. *See Id.* at 638, (an owner with no plans for undeveloped property at the

time of the regulatory taking may have difficulty proving actual damages).[4] However, we cannot fault counsel for their failure to predict our ruling on this issue. We, therefore, remand this matter to the trial court for a determination as to the proper measure of damages in accordance with this opinion.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

NOTE: Justice Stanley G. Feldman did not participate in the determination of this matter.

[4]It is not surprising that Corrigan had no plan of development. As long as the property was "zoned" in the Conservation Area, there was no reasonable hope that anyone would purchase the property, even if there were a plan of development.

AFFIDAVIT OF MAILING UNDER RULE 28.2 AND CERTIFICATE OF SERVICE

STATE OF GEORGIA
COUNTY OF DEKALB

Before me, the undersigned authority authorized to administer oaths, personally appeared George P. Dillard, a person known to me, who, after being first duly sworn, stated the following:

1.

I certify that I am a member of the Bar of the Supreme Court of the United States.

2.

I hereby certify that the original and forty (40) copies of the Petition for Writ of Certiorari prepared by me on behalf of Johnny M. Irvin and David L. Irvin, were delivered by hand, via Federal Express, to the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, within the time allowed for filing and mailing took place before that time.

3.

I further certify that one (1) copy of the Petition for Writ of Certiorari was also served on counsel for Respondents by depositing a copy of same in the United States Mail, with proper postage prepared and affixed, addressed as follows:

Mr. R. Bruce Russell, Sr.
Attorney at Law
P.O. Box 1202
Clayton, GA 30525

Mr. Frank W. Armstrong
Mr. William H. Blalock, Jr.
Stewart, Melvin & House
P.O. Box 430
Gainesville, GA 30503

This 4th day of ~~August~~ Sept, 1986.

George P. Dillard

Sworn and subscribed
before me this 4th day
of ~~August~~ Sept, 1986.

Notary Public

Notary Public, DeKalb County Georgia
My Commission Expires July 5, 1990